



NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

RIN 2700-AD79

Profit and Fee Under Federal Financial Assistance Awards

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA is revising the NASA Grant & Cooperative Agreement

Handbook to clarify that NASA does not pay profit or fee on Federal Financial Assistance awards, i.e. grants and cooperative agreements, to non-profit organizations. This rule makes changes to NASA regulations to reflect that revision.

DATES: Effective [Insert date 30 days after publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: William Roets, NASA Office of Procurement, Contract Management Division, Suite 5K34, 202-358-4483, william.roets-1@nasa.gov.

SUPPLEMENTAL INFORMATION:

I. Background:

NASA published a proposed rule for Profit and Fee under Financial Assistance Awards in the Federal Register on January 11, 2012 (77 FR 1657). The public comment period closed on March 11, 2012. By the end of the established comment period, NASA received comments from one entity. However, those comments were subsequently determined to have been submitted to the incorrect docket and were not applicable to the proposed rule. After the specified end date for the submission of comments had passed, three organizations submitted late comments to the proposed rule. NASA accepted the late comments. Based on the comments received and subsequent revisions to the proposed rule, NASA published a second proposed rule in the Federal Register on February 25, 2014 (79 FR 10346). The public comment period closed on April 28, 2014. By the

end of the established comment period, NASA received comments from three entities. After the specified end date for the submission of comments had passed, one organization submitted supplementary comments to their original comments. NASA accepted these late comments.

II. Discussion and Analysis

Historically, NASA has discouraged the payment of profit or fee under its Federal Financial Assistance awards because payment in excess of costs is inconsistent with the intent of grants and cooperative agreements which provide funding in the form of financial assistance to recipients for their performance of a public purpose. For commercial firms, payment of profit or fee is specifically prohibited under NASA grants and cooperative agreements (See NASA Grant and Cooperative Handbook, Subpart 1274.204). Because this prohibition does not include non-profit organizations, NASA's policy has been misinterpreted and inconsistent application has occurred. Therefore, this final rule extends the prohibition on the payment of profit or fee to all recipients of NASA grants and cooperative agreements, alleviating the misinterpretation and inconsistent application of the policy.

Based on a review of the public comments discussed below, NASA has concluded that no change to the second proposed rule is necessary. NASA received comments from three respondents. New comments, not already addressed in response to the first proposed rule, are discussed below. Comments that were received in response to the first proposed rule were addressed in the second proposed rule at 79 FR 10346, February 25, 2014.

Comment 1: Respondent inquired if this rule impacts NASA Grant and Cooperative Handbook, Subpart 1274.204(f), profit applicability, which allows profit in some cases.

Response: This rule does not impact NASA Grant and Cooperative Handbook, Subpart 1274.204(f). Profit associated with cooperative agreements awarded to commercial firms may be paid by the recipient to subcontractors in accordance with Subpart 1274.204(f).

Comment 2: Respondent inquired as to whether profit or fee can be paid in the situation where a private consultant might be hired to help inform the effort. Private consultant's hourly rate could have profit or fee built into the rate and we may not have visibility into the components (direct and indirect costs, profit, etc...) that comprise the hourly rate.

Response: This rule does not impact this situation. In this case, the hourly rate would invariably represent a commercial market rate for these services where a detailed cost breakdown of the hourly rate by cost element would not be required. Thus, profit or fee analysis would not be required.

Comment 3: Prohibiting the payment of profit or fee to non-profit organizations will have a devastating and large detrimental effect on non-profit organizations and their partners.

Response: NASA continues to support non-profit entities and the valuable contributions they supply to the NASA mission. NASA has historically discouraged the payment of profit or fee to non-profit entities. The intent of this rule is to clarify this point that NASA will not pay for profit or fee where profit or fee is defined as the amount above allowable costs. Management fees that are allowable costs within the guidelines established in OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Chapter I, Chapter II, Parts 200, 215, 220, 225, and 230) will continue to be paid.

Comment 4: Management fee is intended to provide a non-profit entity with a modest source of funds to meet business expenses that are not reimbursable. Non-profits have many costs that are not allowable under government regulations but must be paid by non-profit entities in order to keep operating. Without management fee, non-profits would find it impossible to continue operations.

Response: NASA pays for business expenses/costs that are reimbursable in accordance with the guidelines in OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Chapter I, Chapter II, Parts 200, 215, 220, 225, and

230). Paying business expenses/costs that are not reimbursable through a management fee would be circumventing these OMB guidelines, and inappropriate for financial assistance instruments.

Comment 5: Respondent stated that NASA's interpretation of statutory authorities was too narrowly focused and that NASA has the statutory authority to pay a management fee to non-profit entities.

Response: NASA agrees that the Space Act of 1958 (42 U.S.C. 2473(c)(5)) provides NASA with broad authority and discretion to award grants and cooperative agreements to fulfill its mission. However, these authorities do not expressly or explicitly allow for the payment of profit or fee, sometimes referred to as a management fee, when such fee is defined as the amount above allowable costs. The payment of profit or fee under Federal Financial Assistance awards is inconsistent with the intent of grants and cooperative agreements which provide funding in the form of financial assistance to recipients for their performance of a public purpose and therefore should not be allowed.

Comment 6: Respondent took issue with the NASA statement that "Federal agencies are only authorized to pay for allowable, allocable, reasonable, and necessary costs" stating that there is no cost principle that requires that a cost must be "necessary" to the performance of a cooperative agreement.

Response: Pursuant to OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, section 200.403, Factors affecting allowability of costs, "necessary" is part of the general criteria that a cost must meet in order to be allowable under Federal awards.

Comment 7: Respondent took issue with NASA statement that "grant and cooperative agreement regulation is incomplete in its coverage of profit and fee in that it fails to address non-profit organizations". Respondent stated that this statement is inaccurate. NASA Grant Information

Circular (GIC) 99-1 is specific regulatory action regarding payment of management fees on grants and cooperative agreements to non-profit entities.

Response: NASA Grant Information Circulars (GICs) are non-regulatory, internal guidance and the grant and cooperative agreement regulation referred to was the NASA Grant and Cooperative Agreement Handbook which is codified beginning at 14 C.F.R. 1260.

Comment 8: Respondent stated that the final OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Chapter I, Chapter II, Parts 200, 215, 220, 225, and 230) rule provides NASA the authority to authorize fee or profit under an award. Specifically, the guidance states that “the non-Federal entity may not earn or keep any profit resulting from Federal financial assistance, unless expressly authorized by the terms and conditions of the Federal award”.

Response: In implementing the OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Chapter I, Chapter II, Parts 200, 215, 220, 225, and 230), it is NASA policy to not pay profit or fee under grant and cooperative agreement awards. NASA maintains that it is inappropriate to pay profit and fee under its Federal Financial Assistance awards because payment in excess of costs is inconsistent with the intent of grant and cooperative agreements which provide funding in the form of financial assistance to recipients for their performance of a public purpose.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of

E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

NASA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule does not impose any additional requirements on small entities and currently less than 1 percent of recipients of NASA grants and cooperative agreements receive profit or management fees.

V. Paperwork Reduction Act

The Paper Reduction Act (Pub. L. 104-13) is not applicable because the prohibition on payment of profit and management fees by NASA does not require the submission of any information by recipients that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 14 CFR 1260

Colleges and universities, Business and Industry, Grant programs, Grants administration, Cooperative agreements, State and local governments, Non-profit organizations, Commercial firms, Recipients

Cynthia Boots
Alternate Federal Register Liaison

Accordingly, 14 CFR Part 1260 is amended as follows:

PART 1260-GRANTS AND COOPERATIVE AGREEMENTS

1. The authority citation for 14 CFR 1260 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1), Pub. L. 97-258, 96 Stat. 1003 (31 U.S.C. 6301, et seq.), and OMB Circular A-110.

2. In § 1260.4, paragraph (b)(2) is revised to read as follows:

§ 1260.4 Applicability.

* * * * *

(b)* * *

(2) Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather than assistance instrument, in all cases where fee or profit is to be paid to the recipient of the instrument or the instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives. Grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.

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3. In § 1260.10, paragraph (b)(1)(iv) is added to read as follows:

§ 1260.10 Proposals.

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(b)* * *

(1)* * *

(iv) Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather than assistance instrument, in all cases where fee or profit is to be paid to the recipient of the instrument or the instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives. Grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.

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4. In § 1260.14, paragraph (e) is added to read as follows:

§ 1260.14 Limitations.

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(e) Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather than assistance instrument, in all cases where fee or profit is to be paid to the recipient of the instrument or the instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives. Grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.

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